

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2717

Cir. Ct. No. 2012TR3800

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF OSHKOSH,

PLAINTIFF-RESPONDENT,

V.

ERNEST D. LEHL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ Ernest D. Lehl appeals from his judgment of conviction for operating a motor vehicle while intoxicated entered after the trial

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

court denied his motion to suppress evidence obtained after an officer decided to extend a traffic stop to investigate him for that offense. Lehl concedes on appeal that he was lawfully stopped by the officer because the license plate lights on his vehicle were not working, but argues that the officer lacked reasonable suspicion to extend the stop for the OWI investigation. We disagree and affirm.

BACKGROUND

¶2 The arresting officer was the only witness to testify at the hearing on Lehl's motion to suppress. He provided the following uncontested facts relevant to this appeal. Around midnight on March 10, 2012, the officer began following a car after noting that it was coming from an area he described as "a blocked off road ... because of some construction." The officer testified that "[w]e had been having some problems with vehicles parked back there doing numerous illegal things so that's what drew my attention to the vehicle." The officer acknowledged it was not illegal for the car to be in that area, but he found it "odd" for the car to be coming from there at that hour of the night.

¶3 Following the vehicle, the officer noticed that the right turn signal that went on as the vehicle approached an intersection "never went off" after the vehicle finished veering right onto an angled street at the intersection and that the turn signal remained on until after the vehicle stopped at and went through, without turning, a subsequent four-way stop intersection. During this time, the officer also observed that the vehicle's license plate lights were not working. The officer pulled over the vehicle and informed the driver, Lehl, that he had been stopped because of the nonfunctioning license plate lights. The officer also inquired if the turn signal failed to go off due to driver error or vehicle defect.

¶4 The officer observed that Lehl had “bloodshot, watery, glazed over eyes” and noticed an odor of intoxicants, which he believed was coming from Lehl, who was alone in the car. When the officer asked Lehl if he had been drinking, Lehl responded that he was coming from fishing, had brought alcohol there with him, and “made some mixed drinks with whiskey” while fishing. Based on his observations up to that point, the officer had Lehl exit the vehicle and perform field sobriety tests, which ultimately led to Lehl’s arrest for OWI.

¶5 On cross-examination at the suppression hearing, the officer acknowledged that during the twenty-one blocks he followed Lehl before stopping him, he observed no law violations other than the nonfunctioning license plate lights and no questionable driving other than the turn signal which remained on for an extended period of time. The officer further acknowledged that he did not recall observing any deficiencies with Lehl’s “motor coordination” while Lehl was seated in his vehicle.

¶6 Lehl filed a motion to suppress evidence from the OWI investigation, arguing in relevant part that the officer lacked reasonable suspicion to extend the stop to investigate him for OWI. The trial court denied the motion, Lehl was convicted and he now appeals.

DISCUSSION

¶7 According to Lehl, the “sole issue” on appeal is whether the officer had reasonable suspicion to extend the traffic stop and request that Lehl exit the vehicle for field sobriety tests. Reasonable suspicion exists if, under the totality of the circumstances, “the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime.” *State v. Post*, 2007

WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. It must be based on more than an officer's "inchoate and unparticularized suspicion or 'hunch.'" *Id.*, ¶10 (citation omitted). An officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the [extended] stop." *Id.* (citation omitted); *see also State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999).²

¶8 Here, the officer testified that his attention was initially drawn to Lehl's vehicle because it was coming from an area that was blocked off due to construction and was the site of prior illegal activity. He thought it "odd" that a vehicle would be coming from that area around midnight. In addition to noticing the nonfunctioning license plate lights while following Lehl, the officer observed that a turn signal that went on as the vehicle approached an intersection "never went off" after the vehicle finished veering onto another street at the intersection. Rather, the signal remained on until after the vehicle continued, without turning, through a subsequent intersection. The officer's concern that the signal may have remained on for an extended period of time due to driver error was reasonable. Making contact with Lehl, the officer observed an odor of alcohol and that Lehl had "bloodshot, watery, glazed over eyes." Lehl stated he was coming from fishing and had been making "mixed drinks with whiskey" while fishing.

² Though seemingly inconsistent with his argument, addressed later, that reasonable suspicion did not exist in part because the officer observed no additional questionable driving during the twenty-one blocks he followed Lehl, Lehl intimates that our focus should be only on suspicious factors the officer observed *during* the traffic stop. We point out, however, that a law enforcement officer may lawfully extend a traffic stop for an OWI investigation, if, during the stop, "the officer discover[s] information ... which, *when combined with information already acquired*, provide[s] reasonable suspicion that [the defendant] was driving while under the influence of an intoxicant." *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 695 N.W.2d 394 (emphasis added). In other words, we may consider all of the information available to the officer when he asked Lehl to perform field sobriety tests; we are not limited to only information obtained during the stop.

¶9 From this evidence, a reasonable officer would have concluded that Lehl had consumed multiple “mixed drinks” prior to driving, enough to cause his eyes to be “bloodshot, watery, [and] glazed over,” create an odor of intoxicants, and quite possibly contribute to the turn signal remaining on for the extended period of time previously noted. In light of the totality of the circumstances, the officer’s suspicion that Lehl was operating under the influence was reasonable and justified the officer’s OWI investigation.

¶10 Lehl places much emphasis on the officer’s acknowledgment that he followed Lehl for twenty-one blocks without observing other law violations or questionable driving and did not recall Lehl exhibiting “motor coordination” problems while he was seated in his vehicle. Based on that, Lehl argues that “under the totality of the circumstances” the officer could not have reasonably suspected that Lehl was operating while intoxicated. We disagree.

¶11 Law enforcement officers are not required to rule out the possibility of lawful behavior—unimpaired driving—before conducting an investigation into potentially unlawful behavior—impaired driving. See *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Here, the officer’s lack of observation of certain indicia of impairment does not alter our conclusion that his observations of other indicia of impairment were sufficient to constitute reasonable suspicion.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

